Supreme Court, U.S.
FILED
AUG 25 1995
CLERK

No. 95-259

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DARLENE WALTERS,
PETITIONER,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC.
AND LEONARD BIEBER.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, petitioner Darlene Walters respectfully files this Supplemental Brief.

Petitioner files this Supplemental Brief to draw the Court's attention to the regulations promulgated by the Department of Labor under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (Supp. V 1993) (FMLA).

ADDITIONAL REASONS FOR GRANTING THE PETITION

As petitioner noted in her Petition, the FMLA's definition of employer, 29 U.S.C. § 2611(4) (Supp. V 1993), includes precisely the same "for each working day" phrase included in the definition of employer in Title VII, the statute at issue in this case. 42 U.S.C. § 2000e(b) (1988).

Petitioner argued that this phrase in the FMLA is likely to be construed under the payroll method, that is, any employee on the employer's payroll in a calendar week is to be counted for jurisdictional purposes whether or not the employee was present at work each day of that week. (Petition, p. 19-20). That payroll method was rejected by the Seventh Circuit in this case.

Petitioner has discovered that the Department of Labor has issued FMLA regulations that do in fact adopt the payroll method of counting employees. 29 C.F.R. § 825.100 *et seq.*, 60 Fed. Reg. 2179, 2238 (Jan. 6, 1995) (App., *infra*, 1a).

As Section 825.105 of the Department of Labor's FMLA regulations provides in pertinent part:

> (b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is

> received for the week. . . .
>
> (c) . . . Part-time employees, like full-time employees, are considered to be employed each working day of a calendar week, as long as they are maintained on the payroll.

29 C.F.R. § 825.105(b) & (c), 60 Fed. Reg. 2240 (Jan. 6, 1995).

Thus, the conflict grows in the construction of this jurisdictional language contained in various statutory schemes. The importance of the issue presented is clear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST, 1995

SUPPLEMENTAL APPENDIX

RELEVANT PROVISIONS OF THE FINAL REGULATIONS IMPLEMENTING THE FAMILY AND MEDICAL LEAVE ACT OF 1993 29 C.F.R. PART 825, 60 FED. REG. 2179 (1995)

§ 825.104 ***What employers are covered by the Act?***

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

* * * * *

§ 825.105 ***In determining whether an employer is covered by FMLA, what does it mean to employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year?***

* * * * *

(b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week.

However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

* * * * *